No. 14-7505

IN THE

Supreme Court of the United States

Court, U.S.
FILED
JUN - 4 2015
OFFICE OF THE CLERK

TIMOTHY LEE HURST,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF OF *AMICI CURIAE* FORMER FLORIDA CIRCUIT COURT JUDGES IN SUPPORT OF PETITIONER

STUART L. HARTSTONE
ATTORNEY AT LAW
STUART L. HARTSTONE, P.A.
5112 Ventura Drive
Delray Beach, Florida 33484
(607) 227-8051

SONYA RUDENSTINE
ATTORNEY AT LAW
Counsel of Record
2531 N.W. 41st Street, Suite E
Gainesville, Florida 32606
(352) 374-0604
srudenstine@yahoo.com

Counsel for Amici Curiae

259899

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CONTENTS..... i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF THE ARGUMENT... 4

ARGUMENT.. 6

THE DECISION TO IMPOSE A DEATH SENTENCE HAS UNIQUE FEATURES THAT REQUIRE IT BE MADE BY A JURY OF LAY CITIZENS. 6

A. Whether Retribution Demands a Death Sentence is a Determination Best Made by a Jury..... 9

B. Because of the Central Role of Mitigation in Post-*Gregg* Capital Sentencing, the Decision Whether to Impose a Death Sentence Should Be Made by a Jury 11

C. The Advisory Jury under Florida's Death-Penalty Scheme Fails to Satisfy the Eighth Amendment's Reliability Requisite 14

CONCLUSION 18

TABLE OF CITED AUTHORITIES

Page

CASES

Abdul-Kabir v. Quarterman,
550 U.S. 233 (2007) .... .12, 13

Aguirre-Jarguin v. State,
9 So. 3d 593 (Fla. 2009).... ....6, 16, 17

Caldwell v. Mississippi,
472 U.S. 320 (1985)..... ....4, 6

California v. Brown,
479 U.S. 538 (1987)..... .... .5, 12

Duncan v. Louisiana,
391 U.S. 145 (1968). 4, 7-8

Eddings v. Oklahoma,
455 U.S. 104 (1982). .... .12

Furman v. Georgia,
408 U.S. 238 (1972)..... ....5, 6, 14, 15

Gregg v. Georgia,
428 U.S. 153 (1976). 4, 6-7, 9, 11

Harris v. Alabama,
513 U.S. 504 (1995).. 9

Hitchcock v. Dugger,
481 U.S. 393 (1986). 12

Cited Authorities

Page

Kennedy v. Louisiana,
554 U.S. 407 (2008) 4, 9-10

Lamadline v. State,
303 So. 2d 17 (Fla. 1974) ..... .16

Lockett v. Ohio,
438 U.S. 586 (1978) 12, 15

Lowenfield v. Phelps,
484 U.S. 231 (1988) 5, 11

Panetti v. Quarterman,
551 U.S. 930 (2007) 5, 10

Payne v. Tennessee,
501 U.S. 808 (1991) 13

Penry v. Lynaugh,
492 U.S. 302 (1989) 5, 12, 16

Proffitt v. Florida,
428 U.S. 242 (1976) 15

Ring v. Arizona,
536 U.S. 584 (2002) ..... *passim*

Roper v. Simmons,
543 U.S. 551 (2005) 13

Schriro v. Summerlin,
542 U.S. 348 (2004) 13, 14

Cited Authorities

Page

Skipper v. South Carolina,
476 U.S. 1 (1986) 12

Spaziano v. Florida,
468 U.S. 447 (1984) 8, 9, 14, 15

Sumner v. Shuman,
483 U.S. 66 (1987) ... .14

Teague v. Lane,
489 U.S. 288 (1989) 13

Tedder v. State,
322 So. 2d 908 (Fla. 1975) 5-6, 16

Tennard v. Dretke,
542 U.S. 274 (2004) 12

Trop v. Dulles,
356 U.S. 86 (1958) 13, 15

Tuilaepa v. California,
512 U.S. 967 (1994) 11-12

Witherspoon v. Illinois,
391 U.S. 510 (1968) 15, 17

Woodson v. North Carolina,
428 U.S. 280 (1976) 4, 6, 12, 14

Cited Authorities

Page

Woodward v. Alabama,
134 S. Ct. 405 (2013).. 7

Zant v. Stephens,
462 U.S. 862 (1983).. 11

STATUTES AND OTHER AUTHORITIES

Sixth Amendment to the U.S. Constitution..... *passim*

Eighth Amendment to the U.S. Constitution ... *passim*

Fourteenth Amendment to the U.S. Constitution.. *passim*

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

Fla. Stat. § 921.141(2) 15

Fla. Stat. § 921.141(3) 15, 16

Fla. Std. Jury Instr. (Crim.) 7.11. 16

Leg. 268, 104th Leg., 1st Sess. (Neb. 2015) 7

Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*,
64 J. Crim. L. & Criminology 10 (1973).. 15

Cited Authorities

Page

Judge O.H. Eaton, Jr., *Capital Punishment: A Failed Experiment (Part 2)*, 24 Florida Defender 56 (Spring 2012) 10

William J. Bowers, *et al.*, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making*, 63 Wash. & Lee L. Rev. 931 (2006) 16-17

INTEREST OF *AMICI CURIAE*[1]

Amici are former Florida jurists who presided over capital trials in their capacity as circuit court judges. *Amici* consist of a bipartisan group ranging across the political spectrum. *Amici* include both proponents and opponents of capital punishment, but all *Amici* agree that by providing judges, rather than juries, with the independent power to issue a death sentence, Florida's capital sentencing statute violates the Eighth Amendment to the United States Constitution.

The individual *Amici* are:

- Judge Thomas H. Bateman, III served on the Circuit Court for Florida's Second Judicial Circuit Court from 2001 through 2009, and as Leon County Court Judge from 1990 through 2001. While a jurist, he served as Associate Dean of the Florida College of Advanced Judicial Studies and a contributing faculty member to the AJS course entitled Handling Capital Cases, under the Chairmanship of *Amicus* Judge O.H. Eaton, Jr. Judge Bateman has served as a member of the Supreme Court of Florida's Criminal Court Steering Committee and twice served as Chair of The Florida Bar's Criminal Procedure Rules Committee. Before becoming a Judge, he served

1. Pursuant to Supreme Court Rules 37.3(a) and 37.6, *Amici Curiae* certify that no counsel for a party authored this brief in whole or part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of the brief, and that the parties have consented to the filing of this brief in letters submitted herewith.

as an Assistant Attorney General for the State of Florida, an Assistant Public Defender for Orange County, Florida, and a Deputy Sheriff for the Broward County Sheriff's Office.

- Judge Nikki Ann Clark served on the Circuit Court for Florida's Second Judicial Circuit from 1993 through 2009. She was then appointed to serve on the First District Court of Appeal in 2009 by Governor Charlie Crist and retired in 2015. She is a former Assistant Attorney General for the State of Florida and a former attorney for Legal Services of North Florida.

- Judge O.H. Eaton, Jr. served on the Circuit Court for Florida's Eighteenth Judicial Circuit Court from 1986 through 2010, including as Chief Judge. He was a member of the Florida Sentencing Commission from 1991 until 1998, and served as Chair of the Criminal Justice Section of the Florida Conference of Circuit Judges from 1994 through 1996. He was selected to be a member of the American Bar Association's Florida Capital Punishment Assessment Committee (2004-2005), and was the Chair of the Supreme Court of Florida's Criminal Court Steering Committee from its inception in 2002 until 2010. He teaches the Handling Capital Cases course at the Florida College of Advanced Judicial Studies and at the National Judicial College, University of Nevada, Reno.

- Judge Janet E. Ferris served on the Circuit Court for Florida's Second Judicial Circuit from 1999

through 2009. Prior to becoming a judge, she served as an assistant prosecutor in the Broward County State Attorney's Office, in the Florida Office of the Attorney General as the first Chief of the Civil RICO section, and as General Counsel to the Florida Department of Law Enforcement.

- Judge Martha Ann Lott served on the Circuit Court for Florida's Eighth Judicial Circuit from 1997-2013, and was Chief Judge from 2009 through 2012. She served as Alachua County Court Judge from 1991 through 1997. Prior to becoming a judge, she served as an assistant public defender and worked in private practice.

- Judge Philip J. Padovano served on the Circuit Court for Florida's Second Judicial Circuit from 1988 through 1996, at which time he was appointed to serve on the First District Court of Appeal until his retirement in 2015. For the past fifteen years, he has served as Chair of the Florida Bar Association's Committees on Florida Standard Jury Instructions in Criminal Cases and Committee to Recommend Minimum Standards for Lawyers in Capital Cases.

- Judge Larry G. Turner served on the Circuit Court for Florida's Eighth Judicial Circuit from 1997 through 2004. Early in his career, he served as an Assistant State Attorney for the Eighth Judicial Circuit, and then began work in private practice. He is a former President of the Florida Association for Criminal Defense Lawyers and has served as a member of the Executive Council

of Florida Bar Criminal Law Section for twelve years. Judge Turner has taught both academic and practice courses as an adjunct professor at the University of Florida Levin College of Law.

SUMMARY OF THE ARGUMENT

This Court repeatedly has held that, if it is to withstand Eighth Amendment scrutiny, capital sentencing requires heightened reliability and, thus, heightened procedural safeguards. *See, e.g., Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976); *Gregg v. Georgia*, 428 U.S. 153, 188-89 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). Similarly, the Court has emphasized the importance of juries in protecting our citizenry from arbitrary government action that leads to the unjust deprivation of liberty. *See Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968). For three, interrelated reasons, *Amici*, all former Florida trial judges who have presided over capital trials, believe that, because a death sentence constitutes the ultimate deprivation of liberty, its application can have constitutional legitimacy only when it arises from the reasoned deliberations of twelve jurors who represent a cross-section of the community, not from the judgment of a single, elected jurist.

First, the primary goal of today's capital-sentencing statutes is retribution. Because retribution's goal is to reflect "society's and the victim's interest in seeing that the offender is repaid for the hurt he caused," *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (citations omitted), and because the decision to deprive the defendant of his or her life is so unique in kind and severity, the decision

that retribution demands imposition of the death penalty should only be made by twelve representatives of the "community as a whole," *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), as they "are more likely to express the 'conscience of the community'" than are judges. *Ring v. Arizona*, 536 U.S. 584, 615-16 (2002) (Breyer, J., concurring in judgment) (citation omitted).

Second, capital sentencing involves a weighing of aggravating and mitigating circumstances. The former are largely fact-bound circumstances designed to narrow the class of death-eligible defendants, *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988), while the latter must take into account a vast array of evidence designed to ensure that the "sentence imposed . . . reflect[s] a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)). In short, the decision whether mitigating circumstances serve as a basis for sparing a defendant's life is distinctly dependent on contemporary community moral judgments and must therefore be made by the community's representatives – jurors – in order to ensure the reliability that the Eighth Amendment demands.

Finally, Florida's transition to judicial sentencing in capital cases was a result of the misguided interpretation of *Furman v. Georgia*, 408 U.S. 238 (1972), as prohibiting all discretionary capital sentencing by juries. The Supreme Court of Florida later endeavored to fix this error by requiring trial judges to give "great weight" to a jury's advisory verdict when determining whether to sentence a defendant to death. *Tedder v. State*, 322 So. 2d

908, 910 (Fla. 1975). But without requiring jurors to report specific findings as to which aggravating and mitigating circumstances they found and how those circumstances were applied, and without defining the meaning of "great weight," the Supreme Court left trial judges to apply an undefined term to an undefined verdict. When the requirement that judges substitute their own judgment for that of the "conscience of the community" is combined with the uncertainty of having to apply "great weight" to an "essentially meaningless" jury verdict, *Aguirre-Jarguin v. State*, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring), the heightened safeguards required before imposition of the ultimate sentence all but disappear in Florida. *Amici* therefore believe this Court should find Florida's death-sentencing statute unconstitutional under the Eighth Amendment.

ARGUMENT

THE DECISION TO IMPOSE A DEATH SENTENCE HAS UNIQUE FEATURES THAT REQUIRE IT BE MADE BY A JURY OF LAY CITIZENS.

This Court has long recognized that death is fundamentally different in kind from any other punishment that society may impose. *Furman v. Georgia*, 408 U.S. 238, 286-291 (1972) (Brennan J., concurring). The "qualitative difference" in its finality, *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), demands a correspondingly "heightened 'need for reliability in the determination that death is the appropriate punishment in a specific case.'" *Caldwell v. Mississippi*, 472 U.S. 320, 323 (1985) (quoting *Woodson*, 428 U.S. at 305 (1976)). In *Gregg v. Georgia*, 428

U.S. 153, 188-89 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.), this Court made clear that in order for a state's capital punishment scheme to withstand Eighth Amendment scrutiny, states are required to apply special procedural safeguards to "minimize the risk of wholly arbitrary and capricious action" in imposing the death penalty. As former Florida trial judges with significant experience presiding over capital trials, *Amici* have come to the conclusion that, in keeping with the death-penalty schemes of the federal system and the vast majority of states,[2] "[o]ne such safeguard . . . is that a jury, and not a judge, should impose any sentence of death." *Woodward v. Alabama*, 134 S. Ct. 405, 407 (2013) (Sotomayor, J., dissenting from denial of certiorari).

Reliance on juries to safeguard against arbitrary and capricious government action is well rooted in our system's history:

> The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. . . . The framers of the constitutions strove to create

---

2. In 27 of the 31 states that maintain the death penalty, as well as the federal system, a death sentence may only be imposed by the jury. *See Woodward v. Alabama*, 134 S. Ct. 405, 407 n.2 (2013) (Sotomayor, J., dissenting from denial of certiorari). Only Florida, Alabama, Delaware and Montana leave the ultimate sentencing decision to the judge. *Id.* Nebraska, which formerly allowed judicial sentencing, abolished the death penalty by legislative act on May 27, 2015. *See* Leg. 268, 104th Leg., 1st Sess. (Neb. 2015).

> an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge. If the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it. Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power—a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or group of judges. Fear of unchecked power, so typical of our State and Federal Governments in other respects, found expression in the criminal law in this insistence upon community participation in the determination of guilt or innocence.

Duncan v. Louisiana, 391 U.S. 145, 155-56 (1968) (footnote omitted).

In accord with the Eighth Amendment's heightened need for reliability, "the right to have an authentic representative of the community apply its lay perspective to the determination that must precede a deprivation of liberty [] applies with special force to the determination that must precede a deprivation of life." *Spaziano v. Florida*, 468 U.S. 447, 482-83 (1984) (Stevens, J., concurring in part and dissenting in part). "[T]he life-or-death decision in capital cases depends upon its link

to community values for its moral and constitutional legitimacy." *Id.* at 483. Having been charged with the grueling task of deciding the fate of numerous capital defendants, *Amici* believe the conclusion that a sentence of death is appropriate in a particular case is one far more fit for juries to make. The following important considerations have compelled us to believe that the Eighth Amendment requires that safeguard.

A. Whether Retribution Demands a Death Sentence is a Determination Best Made by a Jury.

While this Court has identified three societal functions served by capital punishment—deterrence, incapacitation, and retribution, *see Gregg*, 428 U.S. at 183—*Amici* are convinced that the primary justification for today's capital punishment system is retribution. *See Ring v. Arizona*, 536 U.S. 584, 614-15 (2002) (Breyer, J., concurring in judgment) (citing studies to demonstrate "the continued difficulty of justifying capital punishment in terms of its ability to deter crime [or] incapacitate offenders"); *Harris v. Alabama*, 513 U.S. 504, 517-18 (1995) (Stevens, J., dissenting) (dispelling rehabilitation, incapacitation, and deterrence justifications). "[C]apital punishment is an expression of society's moral outrage at particularly offensive conduct," *Gregg*, 428 U.S. at 183, and a sentence of death thus "expresses the community's judgment that no lesser sanction will provide an adequate response to the defendant's outrageous affront to humanity." *Harris*, 513 U.S. at 518 (Stevens, J., dissenting) (citing *Gregg*, 428 U.S. at 184).

Because retribution's goal is to reflect "society's and the victim's interest in seeing that the offender is

repaid for the hurt he caused," *Kennedy v. Louisiana*, 554 U.S. 407, 442 (2008) (citations omitted), and because the decision to deprive the defendant of his or her life is so unique in kind and severity, *Amici* believe that twelve representatives of the "community as a whole," *Panetti v. Quarterman*, 551 U.S. 930, 958 (2007), should be charged with determining whether retribution demands imposition of the death penalty through the deliberative process. As Justice Breyer notes in his concurrence in *Ring*, jurors "possess an important comparative advantage over judges . . [because] they are more likely to express the 'conscience of the community' on the ultimate question of life or death." *Ring*, 536 U.S. at 615-16 (Breyer, J., concurring in judgment) (citation omitted).

This point was recently underscored in an article by *Amicus* Judge O.H. Eaton, Jr., who has for many years taught a mandatory, week-long judicial training course for Florida trial judges newly-assigned to handle capital cases. *See* Judge O.H. Eaton, Jr., *Capital Punishment: A Failed Experiment (Part 2)*, 24 Florida Defender 56, 60-61 (Spring 2012). During the training, new judges are presented with a hypothetical case about the murder of a drug dealer involving three defendants of varying degrees of culpability. *Id.* at 60. At the end of the week, the student judges are asked what sentence they would impose for the most culpable of the defendants. *Id.* Over a twelve-year period (2001-2012), the judges' verdicts were split virtually down the middle every year: approximately 45 percent of the judges consistently voted to sentence the most culpable of the defendants to life in prison and 55 percent voted to sentence him to death. *Id.*

This statistical evidence, while not scientific, provides credible data that the sentence in a capital case has more to do with the judicial assignment than the facts of the

case. Each elected jurist comes to the bench with his or her own background, experience, and belief system, all likely to inform his or her verdict. As Judge Eaton's judicial course demonstrates, two judges can look at the same case, with the same set of facts, and reach different verdicts. While this is also the case for two jurors, we, as former trial judges who have grappled with such life-and-death decisions, believe that a sentence of death stemming from the considered judgment of twelve members of a jury engaging in the deliberative process is likely to be a more reliable representation of the community's moral values and conscience than one imposed by a single judge.

B. Because of the Central Role of Mitigation in Post-*Gregg* Capital Sentencing, the Decision Whether to Impose a Death Sentence Should Be Made by a Jury.

In the wake of *Gregg* and its companion cases, all American capital-sentencing procedures have integrated the weighing of aggravating against mitigating circumstances. Because the purpose of aggravating circumstances is to provide the sentencer with the guidance needed to "genuinely narrow the class of persons eligible for the death penalty" to those whose crimes warrant the most severe sentence, *Lowenfield v. Phelps*, 484 U.S. 231, 244 (1988) (quoting *Zant v. Stephens*, 462 U.S. 862, 877 (1983)), the finding of an aggravating circumstance involves a fact-bound inquiry with relatively fixed, specific contours.[3] *See Tuilaepa v. California*, 512 U.S. 967, 973

---

3. The Sixth Amendment, as construed by this Court in *Ring v. Arizona*, 536 U.S. 584 (2002), requires that the finding of any aggravating circumstance which is the prerequisite for imposing a capital sentence be made by a jury.

(1994) ("Eligibility factors almost of necessity require an answer to a question with a factual nexus to the crime or the defendant . . . .").

Conversely, mitigating circumstances serve to ensure that capital offenders are treated "as uniquely individual human beings . [and not] as members of a faceless, undifferentiated mass to be subjected to the blind infliction of death." *Woodson*, 428 U.S. at 304. Thus, the consideration of mitigating circumstances must be wide-ranging and must take into account a vast array of circumstances that are not reducible to sharp-edged facts but involve complex, value-laden judgments. *See, e.g., Tennard v. Dretke*, 542 U.S. 274, 284 (2004) (holding no factual nexus to crime needed for mitigating evidence to be relevant).

For more than a third of a century now, it has been the rule that "the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion) (footnotes omitted); *accord, e.g., Hitchcock v. Dugger*, 481 U.S. 393, 399 (1986); *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v. Oklahoma*, 455 U.S. 104, 114 (1982). The premise of this requirement is that "the sentence imposed at the penalty stage should reflect a reasoned *moral* response to the defendant's background, character, and crime." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)); *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 263-64 (2007).

The consideration of mitigation as a basis for sparing a defendant's life involves judgments that are unique in the American criminal-justice system in two regards: they take account of a sweeping range of information, much of it irreducible to discrete, concrete, facts; and they explicitly, centrally focus upon *moral* judgment. *See Payne v. Tennessee*, 501 U.S. 808, 809 (1991) (noting there are "[v]irtually no limits" placed on relevant mitigating evidence); *Abdul-Kabir*, 550 U.S. at 236-64 ("[B]efore a jury can undertake the grave task of imposing a death sentence, it must be allowed to consider a defendant's moral culpability and decide whether death is an appropriate punishment . . . in light of his personal history and characteristics and the circumstances of the offense."). We believe that this kind of judgment must be made not by legal professionals, but by a jury of lay citizens if the death penalty is to comport with "'evolving standards of decency that mark the progress of a maturing society.'" *Roper v. Simmons*, 543 U.S. 551, 561 (2005) (quoting *Trop v. Dulles*, 356 U.S. 86, 101 (1958) (plurality opinion)).

To be sure, this Court has been content to allow judicial factfinding in capital cases in certain contexts, including when the Court considered the retroactivity of *Ring*. *See Schriro v. Summerlin*, 542 U.S. 348, 355-56 (2004). But in *Schriro*, the issue under consideration was not whether jurors were more reliable capital sentencers than jurists, but whether judicial factfinding "'so seriously diminishe[d]'" accurate and reliable factual determinations of aggravating circumstances as to render them constitutionally assailable. *Id.* (applying and citing retroactivity standard in *Teague v. Lane*, 489 U.S. 288, 312-13 (1989)).

Conversely, the decision whether to impose a sentence of death, with its central focus upon the weighing of fact-based aggravating circumstances against "compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson*, 428 U.S. 304-05, is so distinctly dependent upon contemporary community moral judgments that it must be made by the community's representatives – jurors – in order to ensure the reliability that the Eighth Amendment demands.[4]

C. The Advisory Jury under Florida's Death-Penalty Scheme Fails to Satisfy the Eighth Amendment's Reliability Requisite.

Throughout the century leading up to this Court's decision in *Furman*, Florida law required that juries render the final sentencing decisions in capital cases. *Spaziano*, 468 U.S. at 474 (Stevens, J., dissenting). This practice was mandated because juries "maintain a link between contemporary community values and the penal system – a link without which the determination of

---

4. Indeed, in *Schriro*, the Court distinguished the issue before it from the consideration at issue in this case: "The dissent contends that juries are more accurate because they better reflect community standards in deciding whether, for example, a murder was heinous, cruel, or depraved. . . . But the statute here does not condition death eligibility on whether the offense is heinous, cruel, or depraved as determined by community standards." *Schriro v. Summerlin*, 542 U.S. 348, 357 (2004) (citation omitted). By contrast, the Eighth Amendment requirement that a sentencer consider the "'compassionate or mitigating factors stemming from the diverse frailties of humankind,'" *Sumner v. Shuman*, 483 U.S. 66, 74 (1987) (citation omitted), *does* requires the application of "community standards."

punishment would hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'" *Witherspoon v. Illinois*, 391 U.S. 510, 519 n.15 (1968) (quoting *Trop*, 356 U.S. at 101)). Following *Furman*, the Florida Legislature transferred ultimate sentencing authority to trial judges, mandating independent judicial decision-making while retaining jury participation in the form of an advisory role. *See* Fla. Stat. § 921.141(2)-(3) (1973); *Proffitt v. Florida*, 428 U.S. 242, 247-51 (1976).

As Justice Stevens noted in his dissenting opinion in *Spaziano*, "[t]he change in the decision-making process that occurred in 1972 was not motivated by any identifiable change in the legislature's assessment of community values; rather it was a response to this Court's decision in *Furman*." *Spaziano*, 468 U.S. at 474 (Stevens J., dissenting) (citing Ehrhardt & Levinson, *Florida's Legislative Response to Furman: An Exercise in Futility?*, 64 J. Crim. L. & Criminology 10 (1973)). "Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment." *Lockett*, 438 U.S. at 599. The Florida Legislature was among those that misconstrued *Furman* as condemning all discretionary capital sentencing by juries, and it consequently looked to judicial sentencing as a corrective. The Florida Supreme Court early on appreciated that this fix-for-*Furman* had the drastic downside of detaching capital sentencing from contemporary community values. In its own attempt to navigate the "tension" between *Furman*'s perceived command of regularity and Anglo-American law's longstanding recognition of the role of compassionate mitigation as an element in capital sentencing, *see, e.g.*,

Penry, 492 U.S. at 319, the Florida Supreme Court recognized that the jury's advisory verdict "could be a critical factor in determining whether or not the death penalty should be imposed," *Lamadline v. State*, 303 So. 2d 17, 20 (Fla. 1974); and the Court accordingly attempted to enhance the significance of that verdict by declaring that a trial judge must give it "great weight." *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975).

But this well-intended standard has proven impossible to employ reliably for two reasons. First, the jury's general verdict provides the sentencing judge with no specific findings regarding which aggravating and mitigating circumstances were found or how they were applied. *See* Fla. Stat. § 921.141(3). Second, as noted by *Amicus* Judge Eaton, Jr., "a definition of this subjective term, 'great weight,' is not contained in the statute or the case law." *Aguirre-Jarquin v. State*, 9 So. 3d 593, 611 (Fla. 2009) (Pariente, J., specially concurring). Trial judges charged with the discomforting duty to substitute their own moral judgment for the conscience of the community also must wrestle with the impossible task of applying an undefined term to an undefined verdict.[5] Thus, not only is

5. Jurors face a similarly obscure task, for they are asked to pay "due regard to the gravity" of the proceedings, but repeatedly informed that their verdict is a "recommendation," and "advisory," and that "the final decision as to which punishment shall be imposed is the responsibility of the judge. In this case, as the trial judge, that responsibility will fall on me." Fla. Std. Jury Instr. (Crim.) 7.11. Empirical studies reveal that the jury under this type of sentencing scheme feels little responsibility for its sentencing recommendation and that the deliberations are consequently short and less-than thorough. *See, e.g.*, William J. Bowers, *et al.*, *The Decision Maker Matters: An Empirical Examination of the Way the Role of the*

the reliability of Florida's capital sentencing compromised by severing the crucial "link [to] contemporary community values," *Witherspoon*, 391 U.S. at 519 n.15, it is further undermined by the uncertainty of requiring judges to give "great weight" to a jury's "essentially meaningless" advisory verdict when determining whether to impose the ultimate sentence. *Aguirre-Jarquin*, 9 So. 3d at 611-12.

Given that the decision whether to impose a death sentence goes far beyond a strict legal inquiry, a single elected trial judge cannot reliably supplant the deliberative moral judgment of twelve jurors representing the "conscience of the community." Although we believe that Florida's judges endeavor to perform this duty honorably and to the best of their abilities, it is our considered view that no single judge can accurately speak for the collective conscience of the community with the heightened degree of reliability that the Eighth Amendment requires.

Judge and the Jury Influence Death Penalty Decision-Making, 63 Wash. & Lee L. Rev. 931, 952-80 (2006). Were jurors to be charged with making the decision to impose a death sentence, the instructions would be changed, of course, with the likely result that jurors would understand their awesome task and deliberate accordingly, as they do in the vast majority of jurisdictions that require jury death sentencing. *Id.*

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Florida should be reversed.

Respectfully submitted,

STUART L. HARTSTONE
ATTORNEY AT LAW
STUART L. HARTSTONE, P.A.
5112 Ventura Drive
Delray Beach, Florida 33484
(607) 227-8051

SONYA RUDENSTINE
ATTORNEY AT LAW
Counsel of Record
2531 N.W. 41st Street, Suite E
Gainesville, Florida 32606
(352) 374-0604
srudenstine@yahoo.com

Counsel for Amici Curiae

June 4, 2015